82-1100

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1982

FRED J. GLUSMAN and INTERNATIONAL DRESS SHOP, INC.,

Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,

Appellees.

On Appeal From The Supreme Court Of Nevada

JURISDICTIONAL STATEMENT

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

GEORGE E. GRAZIADEI
SCOTT MICHAEL CANTOR
101 Convention Center Drive
Las Vegas, Nevada 89109
(702) 731-2711
Attorneys for Appellants

Date: December 29, 1982

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

Are the Nevada statutory and regulatory standards, which will be used by Nevada gaming authorities to determine whether appellant's clothing businesses should be shut down, unconstitutionally vague and indefinite?

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Nevada, which appears in the appendix hereto, will be reported at 98 Nevada Reports, but is presently unreported.

BASIS FOR JURISDICTION

The decision of the Supreme Court of Nevada, generally upholding the constitutionality of gaming laws and regulations as applied to non-gaming businesses, was entered on September 30, 1982. A notice of appeal was filed on November 17, 1982 and is attached hereto in the appendix.

This appeal is docketed within 90 days of the final decision below. 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Appellant's application to this Court for a stay of administrative proceedings pending this appeal was denied by Justice Rehnquist on November 18, 1982 in No. A-450.

PROVISIONS OF LAW AND REGULATIONS INVOLVED

Nev. Rev. Stat. §463.160(8) (1979).

> "8. If the premises of a licensed gaming establishment are directly or indirectly owned or under the control of the licensee therein, or of any person controlling, controlled by, or under common control with the licensee, the commission may, upon recommendation of the board, require the application of any business or person for a determination of suitability to be associated with a gaming enterprise if the person or business:
>
> (a) Does business on the premises of the licensed gaming establishment;
>
> (b) Does business with the licensed gaming establishment as a junket representative or ticket purveyor; or
>
> (c) Provides any goods or services to the licensed gaming establishment for a compensation which the board finds to be grossly disproportionate to the value of the goods or services.
>
> If the Commission determines that the business or person is unsuitable to be associated with a gaming enterprise, the association must be terminated. Any agreement which entitles a business other than gaming to be conducted on the premises, or entitles a person or business other than gaming to conduct business with the licensed gaming establishment as

set forth in paragraph (b) or (c) of this subsection, is subject to termination upon a finding of unsuitability of the business or of any person associated therewith. Every such agreement must be deemed to include a provision for its termination without liability on the part of the licensee upon a finding by the commission that the business or any person associated therewith is unsuitable to be associated with a gaming enterprise. Failure expressly to include that condition in the agreement is not a defense in any action brought pursuant to this section to terminate the agreement. If the application is not presented to the board within 30 days following demand or the unsuitable association is not terminated, the commission may pursue any remedy or combination of remedies provided in this chapter."

Nev. Rev. Stat. §463.170 Qualifications for license or finding of suitability. (1979).

"1. Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, having due consideration for the proper protection of the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and the declared policy of this state, may be issued a state gaming license or found suitable. The burden of proving his qualification to receive any license or be found suitable is on the applicant.

2. An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming,

or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; and

(c) In all other respects qualified to be licensed or found suitable consistently with the declared policy of the state."

Nev. Rev. Stat. §463.210 Investigation of applicant; order recommending approval, denial of license. (1979)

"1. Within a reasonable time after filing of an application and such supplemental information as the board may require, the board shall commence its investigation of the applicant and shall conduct such proceedings in accordance with applicable regulations as it may deem necessary.

2. The board shall make its order, either recommending approval or denial of an application; not longer than 90 days after the application and supporting data are completed and filed with the board. In the event denial of an application is recommended, the board shall prepare and file with the commission its written reasons upon which the order is based.

3. The board shall have full and absolute power and authority to recommend denial of any application for any cause deemed reasonable by the board."

Regulation 3.090 of Regulations of the Nevada Gaming Commission and State Gaming Control Board. Standards for commission action.

"1. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the applicant:

(a) Is a person of good character, honesty and integrity;

(b) Is a person whose background, reputation and associations will not result in adverse publicity for the State of Nevada and its gaming industry; and

(c) Has adequate business competence and experience for the role or position for which application is made.

2. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the proposed funding of the entire operation shall be (a) adequate for the nature of the proposed operation, and (b) from a suitable source. The suitability of the source of funds shall be determined by the standards enumerated in paragraph 1(a), (b) and (c) above.

(Adopted 10/75.)

MANNER OF RAISING THE FEDERAL QUESTIONS

Appellant originally sought a declaration of the unconstitutionality of the Nevada statutes involved by filing a complaint for such relief in the Eighth Judicial Court of Clark County, Nevada. Appellant asserted in his complaint (¶XII) that the statute for determining whether appellant's business would merit a "finding of suitability" was unconstitutionally vague. The lower court ultimately denied declaratory and injunctive relief in a February 27, 1981 ruling which upheld the constitutionality of the statutory and regulatory scheme.

The question of the vagueness of the Nevada regulatory scheme was raised on appeal to the Supreme Court of Nevada. That Court expressly considered and rejected appellant's federal constitutional claims in its opinion of September 30, 1982. The Court determined in particular that §463.170(2), Nev. Rev. Stat., which defines what a "suitable" business is, "describes with specificity the standards of conduct applicable to a determination of suitability. . . ."

STATEMENT OF THE CASE

Appellant has been operating women's apparel stores in Las Vegas, Nevada for some 15 years. The stores are located in two Las Vegas hotels, the Hilton (three stores) and the Stardust (one store). He has been doing business at these locations for more than a dozen years and his leases have been renewed as necessary. Both the Hilton and the Stardust have specified areas for gaming called "casinos." Glusman's stores are situated several hundred feet from the casinos at both hotels. In none of Glusman's store areas is gambling permitted; moreover, the leases restrict the business of the shops to clothing sales. Appellant is not associated in any way with either the Hilton or the Stardust gambling enterprises; he does not share in their proceedings; and he has no control over them or anyone involved with them.

Despite appellant's total non-involvement in any gaming enterprise, in June, 1980 the Nevada Gaming Commission ordered him to seek a "finding of suitability to be associated with a licensed gaming enterprise" upon pain of termination of the leases at both hotels. As a result, petitioner commenced his proceedings in the District Court for Clark County, Nevada, in June, 1980 to enjoin the Commission's order and to have the relevant Nevada statute declared unconstitutional. Although preliminary injunctive relief was granted, the District Court subsequently denied such relief on final hearing. An appeal was taken to the Nevada Supreme Court, which subsequently upheld the validity of the statutory scheme.

THE SUBSTANTIAL FEDERAL QUESTIONS DISCUSSED

The statutory standards for determining Fred Glusman's "suitability" to continue what he has been doing for the past 15 years are unduly vague. These attempts to define "suitability" deprive him of adequate notice of the possible bases of adverse agency action. Because of their vagueness they fail to give persons of common intelligence a reasonable opportunity to know when their conduct and activities may subject them to adverse government action. *Grayned* v. *City of Rockford*, 408 U.S. 104, 109-109 (1972); *A.B. Small Co.* v. *American Sugar Refinery Co.*, 267 U.S. 233, 239 (1925). Additionally, the absence of explicit standards for agency action invites arbitrary and discriminatory enforcement of the law. *Grayned, supra.*

The vagueness of the "suitability" standard imposed by §463.160(8) initially appears in §463.170(2), which requires findings that an applicant is of good character, honesty and integrity (§463.170[2][a]), that the applicant's prior activities, reputation, habits and associations do not pose a threat to the public interest or enhance the dangers of unsuitable gaming practices (§463.170[2][b]), and that the applicant in all other respects is qualified to be found suitable, consistent with the declared gaming policy of the state. (§463.170[2][c]).

Supplementary regulations and guidelines do not add specificity to these overly general statutory standards, but instead broaden and confuse the concepts even more. Section 3.090(1)(b) of the Regulations requires a finding that the applicant's background, reputation and associations *will not result* in adverse publicity for the state and the gaming industry; section 3.090(1)(c) further requires that

the applicant demonstrate adequate business competence and experience.

Board guidelines dated January 1, 1977, provide that an applicant may be considered unsuitable if he fails to *satisfactorily explain* arrests (¶2); if he associates with, either socially or in business affairs, *persons of notorious* or *unsavory reputation* (¶5); if the applicant would *tend to reflect discredit* on the state and its gaming industry (¶9); and if the applicant lacks a *satisfactory* record of business ethics and competence (¶15).

These standards and guidelines are couched in meaningless generalities. They require "satisfactory" showings and explanations; they refer to vague "associations" with "notorious" or "unsavory" persons; they speak of unknown, future events, such as possibilities that an applicant's reputation *will result* in adverse publicity or will *tend to reflect* discredit on the industry.

Such meaningless civil and administrative standards have been condemned as unconstitutionally vague. *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) (which involved the imposition of penalties for "reprehensible" conduct and conduct "outrageous" to morality and justice); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) (which involved a potential loss of a public school teaching position if the applicant refused an oath, disclaiming to be a "subversive person"). The statutory scheme reminds one of the "gangster crime" voided by this Court in *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) where the statute provided that a "gangster" was "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime . . . ."

Although the Nevada Supreme Court relied upon this Court's decision in *City of Mesquite* v. *Aladdin's Castle*

Inc., ... U.S. ....., 71 L.Ed.2d 152 (1982), it misunderstood this Court's reasoning. This Court merely held that the city in that case was free to give vague or ambiguous directions to investigative officials, to allow them to investigate whether a license applicant has any connection with criminal elements. The standard reviewed by this Court in *Mesquite* was not a standard by which the granting or denial of a license to do business would be determined. In the instant case, petitioner's right to continue his well-established business will be based upon a standard even more vague than the guideline reviewed in *Mesquite*. Moreover, the *Mesquite* standard applied to persons who *voluntarily applied to begin doing* business in the community. Here, the Nevada authorities propose to apply a far more vague standard to an established ongoing business.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

GEORGE E. GRAZIADEI
SCOTT MICHAEL CANTOR
101 Convention Center Drive
Las Vegas, Nevada 89109
(702) 731-2711

Attorneys for Appellants

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